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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

COLONY CAPITAL, LLC, a
Delaware limited liability company, and
COLONY INVESTORS IV, L.P., a
Delaware limited partnership,

Plaintiff,

v.

THE NATIONAL RETIREMENT
FUND, and DOES 1 through 10,
inclusive,

Defendants.

CASE NO.: CV 11-07235-R (AGR_x)

Hon. Manuel L. Real

**NOTICE OF MOTION AND
MOTION TO DISMISS FOR
IMPROPER VENUE OR
TRANSFER OF VENUE
PURSUANT TO 28 U.S.C. § 1404(A)
OR 1406(A); MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

DATE: October 17, 2011
TIME: 10:00 a.m.
COURTROOM: 8

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
FOR IMPROPER VENUE OR TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(A) OR 1406(A)**

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 17, 2011, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 8 of the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012, Defendant the National Retirement Fund ("Defendant") will and hereby does move the Court to dismiss Plaintiffs' Complaint for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) or to transfer this action pursuant to 28 U.S.C. § 1406(a) or 28 U.S.C. § 1404(a) to the United States District Court for the Southern District of New York.

This Motion is based on the following grounds:

(1) Venue is not proper in this district under ERISA's applicable venue provision because the NRF is not administered and does not "do business" in this district, as required by ERISA Section 4301(d), 29 U.S.C. § 1451(d). Accordingly, this action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3) (or, in the alternative, if the Court believes that venue is improper in this district but that it would serve the "interests of justice" to transfer this case rather than dismiss it pursuant to 28 U.S.C. § 1406(a), Defendant respectfully submits that, for the reasons set forth below, the Southern District of New York is the appropriate venue to which to transfer it).

(2) If, however, venue is proper in this district, the case should be transferred to the Southern District of New York, because venue is proper there, and the transfer will serve the convenience of the parties and witnesses and will promote the interest of justice. 28 U.S.C. § 1404(a). The withdrawal liability arose in New York and Rhode Island, where the NRF is administered; the employees for whom employer contributions were made work in New Jersey; key witnesses and documents are located in New York and New Jersey; and, Colony Capital maintains an office in New York and actively engages in business in New York and New Jersey.

1 This Motion is based upon this Notice, the accompanying Memorandum of
2 Points and Authorities, the pleadings in this action and such other evidence and oral
3 argument as the Court may allow.

4 Although the Court's Order Re: Notice to Counsel, dated September 1, 2011,
5 waives Local Rule 7-3, we notified Plaintiffs' counsel of this Motion and, by letter
6 dated September 15, 2011, disclosed to Plaintiffs' counsel the grounds for the Motion.

7
8 DATED: September 19, 2011

Respectfully submitted,

9 GLASER, WEIL, FINK, JACOBS,
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11 By: _____/s/_____

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Defendant, the National Retirement Fund (the “NRF”) respectfully submits this Memorandum of Points and Authorities in support of its motion to dismiss this action due to improper venue or, in the alternative, to transfer this action pursuant to 28 U.S.C. § 1406(a) or 28 U.S.C. § 1404(a) to the United States District Court for the Southern District of New York.

I. INTRODUCTION

On September 1, 2011, plaintiffs, Colony Capital, LLC (“Colony Capital”) and Colony Investors IV, L.P. (“Colony IV”) (collectively the “Colony Parties”) filed this declaratory judgment action against the NRF and “Does 1-10” seeking a declaration that they are not liable to the NRF for withdrawal liability payments assessed by the NRF’s plan sponsor pursuant to the Employee Retirement Income Security Act of 1974, *as amended* (“ERISA”). (Complaint, Docket No. 1 (“Cmplt.”) ¶ 10.) On the same day, the Colony Parties filed a motion seeking, *inter alia*, to stay their obligations to make interim payments mandated by ERISA and to toll the statutory deadline for them to file an arbitration to determine arbitrable issues until this case is decided. (Motion for Preliminary Injunction Pending Declaratory Relief, Docket No. 5.)¹ The Colony Parties’ preemptory actions threaten to turn ERISA on its head—based on the Colony Parties’ mere “say-so” that they are not “employers” under ERISA—and to unfairly burden the NRF and non-party witnesses (who are located in New York and New Jersey) with the time and expense associated with a California litigation, despite that there is no logical connection between this district and this action.²

¹ The NRF will oppose the motion.

² It is likely that the Colony Parties avoided filing this action in the District of New Jersey because well-developed caselaw in the Third Circuit squarely holds that courts do not have jurisdiction to entertain requests for equitable relief from ERISA’s mandatory collection and dispute resolution procedures. *See, e.g., EUSA-Allied Acquis. Corp. v. Teamsters Pension Trust Fund of Phila. & Vicinity*, Civ. Action No. 11-3181, 2011 WL 3651315, at *8-9 (D.N.J. Aug. 18, 2011); *Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137, 140-41 (3d Cir. 1997).

Venue is not proper in this district under ERISA's applicable venue provision because the NRF is not administered and does not "do business" in this district, as required by ERISA Section 4301(d), 29 U.S.C. § 1451(d) ("Section 4301(d)"). Accordingly, this action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3). If, however, venue is proper in this district, the case should be transferred to the Southern District of New York, because venue is proper there, and the transfer will serve the convenience of the parties and witnesses and will promote the interest of justice. 28 U.S.C. § 1404(a). The withdrawal liability arose in New York and Rhode Island, where the NRF is administered; the employees for whom employer contributions were made work in New Jersey; key witnesses and documents are located in New York and New Jersey; and, Colony Capital maintains an office in New York and actively engages in business in New York and New Jersey.

II. STATEMENT OF FACTS AND PERTINENT BACKGROUND

A. The Parties

This lawsuit arises out of withdrawal liability incurred by the Colony Parties when the owner and operator of the Resorts International Hotel and Casino ("Resorts"), Resorts International Hotel, Inc. ("RIH"), withdrew from the NRF. The NRF is a multiemployer pension fund which is in critical status for purposes of the Pension Protection Act. (Declaration of Richard N. Rust, dated September 12, 2011 ("Rust Decl.") ¶¶ 3, 11-18.) The NRF is administered in offices in White Plains, New York (which is located within the Southern District of New York)³ and Lincoln, Rhode Island. (*Id.* at ¶ 5.) In addition, the NRF's business activities generally take place in New York (as well as New Jersey and Rhode Island). The NRF is governed by a board of 48 trustees, half of whom represent employers and half of whom represent the union (the "Trustees"). (*Id.* at ¶ 6.) (There are currently four vacancies.

³ The Southern District of New York includes courthouses in New York City (in the Borough of Manhattan) and White Plains. It would be appropriate to transfer this case to White Plains.

1 (*Id.*) The Trustees conduct regular meetings, generally in New York or New Jersey;
2 none of those meetings has taken place in this district. (*Id.*) Only one of the Trustees
3 is based in the Central District of California. (*Id.*) The other Trustees are based
4 primarily on the east coast. (*Id.*) The NRF's counsel is located in New York, New
5 York. (*Id.* at ¶ 7.)

6 The NRF does not maintain an office in the Central District of California, nor
7 does it have bank account, telephone listing, post office box, property or other assets
8 there. (Rust Decl. at ¶ 4.) The NRF's activities in this district are limited to
9 collecting contributions from employers and paying pension benefits to plan
10 participants. (*Id.* at ¶ 10.) Of the NRF's over 435,000 plan participants, fewer than
11 five percent reside in the Central District of California. (*Id.* at ¶ 9.)

12 Colony IV is a private equity fund, and Colony Capital is Colony IV's
13 investment manager. (Cmpl't. at ¶ 16 (alleging that "The General Partner of Colony
14 IV has a management contract with Colony [Capital] under which Colony [Capital]
15 sources investments for Colony IV and oversees those investments once they are
16 made.") Both are Delaware entities. (*Id.* at ¶¶ 15, 16.) Colony Capital is a multi-
17 national business, with offices throughout the United States, Europe, the Middle East
18 and Asia, including an office in New York City at 660 Madison Avenue, from which
19 Colony Capital executives and personnel (including Colony Capital's General
20 Counsel, Ronald Sanders) operate. (Declaration of Shannon L. Cade, dated
21 September 19, 2011 ("Cade Decl.") ¶ 12.) According to published news reports,
22 Colony Capital has \$30 billion in assets under management. (*Id.* at ¶ 3.) The private
23 equity funds managed by Colony Capital, including Colony IV and at least 15 other
24 funds (as reflected on Colony Capital's website), invest capital in "real estate, non-
25 performing loans, distressed assets, real estate-dependent operating companies, and
26 select commercial and residential development opportunities throughout the world"
27 and engage in "intensive post-acquisition management" of their investments. (*Id.* at ¶
28 4, Ex. C.)

Colony Capital does business in New York and New Jersey. It has availed itself of the jurisdiction of the Southern District of New York by initiating a lawsuit in that court. (Cade Decl. at ¶ 9, Ex. H.) Likewise, Colony Capital has availed itself of, and submitted itself to, the jurisdiction of the New Jersey Casino Control Commission and the Division of Gaming Enforcement of the State of New Jersey Office of the Attorney General (the “New Jersey Gaming Authorities”), including in connection with obtaining a gaming license operate Resorts. (*See* Declaration of Richard Welch in Support of the Colony Plaintiffs’ Motion for Preliminary Injunction Pending Declaratory Relief Action (Docket No. 6) (“Welch Decl.”) at ¶ 21; Cade Decl. at ¶ 9, Ex. H.) Moreover, although the Colony Parties’ lead counsel in this action is based in California, he regularly provides legal services in New York (where his law firm has a large office). (Declaration of Ronald E. Richman, dated September 19, 2011 (“Richman Decl.”), at ¶ 2.)

B. Statutory Framework

Congress amended ERISA in 1980 by enacting the Multiemployer Pension Plan Amendments Act of 1980 (the “MPPAA”), 29 U.S.C. §§ 1381-1405. In enacting the MPPAA, Congress sought to “protect plans from the adverse consequences that resulted when individual employers terminate[d] their participation in, or withdr[e]w from, multiemployer plans.” *Flying Tiger Line v. Teamsters Pension Trust Fund of Phila.*, 830 F.2d 1241, 1243 (3d Cir. 1987) (internal citations and quotations omitted). The MPPAA sets forth a carefully integrated system for the resolution of disputes concerning withdrawal liability. Following an employer’s withdrawal, “[t]he plan sponsor calculates withdrawal liability, notifies the employer, and demands payment” in accordance with the plan’s payment schedule. *Doherty v. Teamsters Pension Trust Fund of Phila. & Vicinity*, 16 F.3d 1386, 1388 (3d Cir. 1994) (citing Section 4219(b)(1) of ERISA, 29 U.S.C. § 1399(b)(1)). The employer may then ask the plan sponsor to review its determination, and the plan sponsor may respond. *See* Section 4219(b)(2) of ERISA, 29 U.S.C. § 1399(b)(2). Any dispute

1 remaining thereafter between an employer and the plan sponsor concerning a
2 determination made by the plan sponsor under Sections 4201 through 4219 of ERISA,
3 29 U.S.C. §§ 1381-99, including whether a “principal purpose of any transaction is to
4 evade or avoid liability under this part,”⁴ must be resolved in a timely initiated
5 arbitration. Section 4221(a)(1) of ERISA, 29 U.S.C. § 1401(a)(1). While the
6 arbitration proceeds, employers are required to make interim payments. 29 U.S.C.
7 §§ 1399(c)(2), 1401(d); *Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137, 139 (3d Cir.
8 1997).

9 Pursuant to ERISA, entities within the same “controlled group” as the
10 contributing employer are liable for their allocable share of the unfunded vested
11 benefits of a pension fund if the employer ceases to have an obligation to contribute
12 to the pension fund. 29 U.S.C. § 1301(b); 29 C.F.R. §§ 4001.2-.3. To be an
13 “employer” in the same controlled group, entities must be (1) “trades or businesses”
14 and (2) have a parent-subsidiary relationship or a brother-sister relationship. 26
15 C.F.R. § 1.414(c)-2. Two authorities have held that private equity funds (and their
16 limited partnerships, general partners and management companies) are “trades or
17 businesses” for purposes of ERISA that can be held liable for the withdrawal liability
18 incurred by the portfolio companies in which they invest: (i) a September 26, 2007
19 PBGC Letter (the “PBGC Letter”) (*see* Cade Decl. ¶ 8, Ex. G), and (ii) a summary
20 judgment ruling from the United States District Court for the Eastern District of
21 Michigan. *See Bd. of Trs., Sheet Metal Workers’ Nat’l Pension Fund v. Palladium*
22 *Equity Partners, LLC*, 722 F. Supp. 2d 854 (E.D. Mich. 2010). In so holding, the
23 PBGC and Eastern District of Michigan considered the private equity funds’ level of
24 influence and control over their portfolio company investments, including their

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27 ⁴ ERISA Section 4212(c) provides that “[i]f a principal purpose of any transaction is
28 to evade or avoid liability under this part, this part shall be applied (and liability shall
be determined and collected) without regard to such transaction.” 29 U.S.C.
§ 1392(c).

1 involvement (whether directly or through a management company) in the day-to-day
2 operations of those entities, including employment, operational and financial matters.
3 *Palladium*, 722 F. Supp. 2d at 870; PBGC Letter at 10-14 (Cade Decl. ¶ 8, Ex. G).⁵

4 **C. The Complaint And Preliminary Injunction Motion**

5 The Colony Parties filed this action seeking a declaration that they are not
6 liable to the NRF for withdrawal liability. Specifically, they seek a declaration that
7 they are not “employers” under ERISA and that a principal purpose of a 2009
8 transaction in which they forfeited their ownership interest in the contributing
9 employer was not to evade or avoid withdrawal liability. Section 4212(c) of ERISA,
10 29 U.S.C. § 1392(c). On the same day as they filed the Complaint, the Colony Parties
11 filed a motion for a preliminary injunction, seeking, *inter alia*, a stay of their
12 obligations to make interim payments mandated by ERISA and to toll the deadline to
13 file a claim in arbitration pending resolution of the declaratory judgment action.

14 As described in the Complaint, the NRF’s plan sponsor’s assessment of
15 withdrawal liability against the Colony Parties arose from their ownership and
16 operation of Resorts, a hotel and casino in Atlantic City, New Jersey. In 2001,
17 Colony IV (through Colony RIH Holdings, Inc. (“Colony RIH”)) purchased a 95
18 percent ownership interest in Resorts International Hotel and Casino, Inc. (“RIHC”),
19 which, through RIH, owned Resorts. (Cmpl. at ¶ 20.) RIH was obligated to
20 contribute to the NRF on behalf of its employees who worked for Resorts in New
21 Jersey who were members of UNITE HERE Local 54, pursuant to the collective
22 bargaining agreement between RIH and the union (the “Collective Bargaining
23

24 ⁵ In determining whether an entity is a “trade or business,” the PBGC and the Eastern
25 District of Michigan applied the test articulated in *Comm’r v. Groetzinger*, 480 U.S.
26 23 (1987), for the purposes of distinguishing trades or businesses from purely
27 personal activities or investments. PBGC Letter at 10; *Palladium*, 722 F. Supp. 2d at
28 867-69. The *Groetzinger* test has two prongs: (1) whether the taxpayer is engaged in
an activity with “the primary purpose of income or profit,” which is a “subjective test
that looks at the taxpayer’s intent,” and (2) “whether the act is conducted with
‘continuity and regularity,’” which is “an objective test that looks at how much time
the taxpayer typically engages in the activity.” PBGC Letter at 10.

1 Agreement”). (Rust Decl. at ¶ 14.) After the acquisition, the Colony Parties were
2 actively involved in the management of RIH and Resorts in New Jersey. For
3 example:

- 4 • The Colony Parties appointed Thomas Barrack, Founder, Chairman, and
5 Chief Executive Officer of Colony Capital as the Treasurer and a
6 Director of RIH. Mr. Barrack was also the Treasurer and a Director of
7 Colony RIH. (Cade Decl. at ¶ 5, Ex. D.)
- 8 • The Colony Parties touted plans to expand and improve Resorts’
9 property in New Jersey, including plans to build a new 500 room hotel
10 tower. (Id. at ¶ 6, Ex. E.)
- 11 • Colony Capital applied for and received a gaming license for purposes of
12 operating the casino at Resorts (and, subsequently, other casinos). (Id. at
13 ¶ 7, Ex. F.)

14 In 2009, RIH defaulted on a \$360 million loan from Column Financial
15 (“Column”), which is a subsidiary of Credit Suisse, and other lenders. (Cmplt. at ¶
16 24.) To settle the lenders’ claims, the Colony Parties agreed to a “deed in lieu of
17 foreclosure” transaction. (Id. at ¶¶ 22, 24, 27.) At the same time, Colony IV assigned
18 all of its ownership interest in Colony RIH (and, accordingly, RIH) to Nicholas Ribis,
19 who previously owned five percent of Colony RIH, in exchange for no consideration
20 from Mr. Ribis (the “2009 Transaction”). (Id. at ¶¶ 27-28.)

21 Upon information and belief, the 2009 Transaction was negotiated by parties
22 primarily located in New York, New York, where Column has its administrative
23 offices and where all of the following were (at the time of the transaction) located:
24 Column’s counsel at Skadden, Arps, Slate, Meagher & Flom LLP’s New York City
25 office, the Colony Parties’ counsel at Wilkie Farr & Gallagher LLP, Colony Capital’s
26 General Counsel (Mr. Sanders) and Mr. Ribis.⁶ (Richman Decl. at ¶¶ 3, 4).

27 _____
28 ⁶ Mr. Ribis once shared office space with Mr. Sanders in Colony Capital's New York
office. (Cade Decl. at ¶ 13.)

1 Significantly, many of the deal documents relating to the 2009 Transaction are
2 governed by New York law. (*See* Welch Decl. Exs. 3, 4, 5 & 7.) In addition, in some
3 of those deal documents, the Colony Parties expressly agreed to submit disputes to
4 state and federal courts in New York State. (*Id.* at Exs. 3, 5 & 7.)

5 In December 2010, RIH completely withdrew from the NRF as the result of the
6 sale of Resorts to DGMB Casino LLC. (Petrocelli Decl. Ex. M; Rust Decl. ¶ 18.) In
7 January 2011, the NRF assessed withdrawal liability against the Colony Parties as
8 members of RIH's controlled group, and demanded payment in accordance with the
9 NRF's payment schedule. (Petrocelli Decl. Exs. B, C; Rust Decl. ¶ 18.) In addition
10 to assessing liability against each of the Colony Parties, the NRF also assessed
11 withdrawal liability against RIH, Mr. Ribis, and Colony RIH. (Rust Decl. ¶ 18.) The
12 Colony Parties sought review of the assessment, and the NRF responded, confirming
13 the assessment. (Petrocelli Decl. ¶¶ 5, 9, 10.) Rather than commencing an arbitration
14 in New York on the evade or avoid issue, the Colony Parties commenced this action
15 and immediately filed a motion seeking, among other things, to delay indefinitely the
16 arbitration.⁷

17 **III. ARGUMENT**

18 **A. Venue Is Not Proper In The Central District Of California Under** 19 **Erisa's Applicable Venue Provision.**

20 The Colony Parties bear the burden of establishing that venue is proper in this
21 district. *Partee v. United Recovery Group*, CV 09-9180, 2010 WL 1816705, *2 (C.D.
22 Cal. May 3, 2010). "The venue statutes are generally intended to protect a defendant
23 from being forced to defend in an unfair or inconvenient forum," *Abrams Shell v.*
24 *Shell Oil Co.*, 165 F. Supp. 2d 1096, 1106 (C.D. Cal. 2001), and "to place the trial in

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26
27 ⁷ RIH and the members of its controlled group are bound to arbitrate withdrawal
28 liability disputes before the American Arbitration Association in New York, New
York pursuant to the Agreement and Declaration of Trust, UNITE HERE National
Retirement Fund (as amended) (the "Trust Agreement"). (Rust Decl. at ¶ 17, Ex. 1.)

1 a place having a logical connection with the parties to the litigation.” *Delta Air Lines,*
2 *Inc. v. W. Confer. of Teamsters Pension Trust Fund*, 722 F. Supp. 725, 728 (N.D. Ga.
3 1989). There is no logical connection between this district and this case. A ruling
4 that this district is the proper venue would be contrary to the policy of protecting
5 defendants from unfairness and inconvenience with regard to the forum where the
6 case may be tried.

7 “ERISA includes a special venue provision applicable to
8 this matter [Section 4301(d)], which provides that ‘[a]n
9 action . . . may be brought in the district where the plan is
10 administered or where a defendant resides or does
11 business[.]”

12 *Flynn v. Berich*, 603 F. Supp. 2d 49, 50 (D.D.C. 2009) (discussing Section 4301(d)
13 (citations omitted)).⁸

14 The NRF is not administered in this district. Rather, it is administered in New
15 York and Rhode Island. (Rust Decl. at ¶ 5.) The Trustees of the NRF generally hold
16 their meetings in New York and New Jersey. (*Id.* at ¶ 6.) They have never met in the
17 Central District of California. (*Id.*) Only one trustee is based in this district. (*Id.*)
18 Thus, venue is proper in this district only if the NRF “does business” in this district.
19 The concept of “doing business” in venue statutes like Section 4301(d) is a “narrower
20 concept than the ‘transacting business’ requirement” in long-arm statutes (the purpose
21 of which is to “protect plaintiffs”) “and likewise requires more than constitutional due
22 process standards for personal jurisdiction” *Delta Air Lines*, 722 F. Supp. at
23 728. Five factors are to be considered in determining whether an entity is “doing
24

25 ⁸ Although the Colony Parties allege in the Complaint that venue is proper under both
26 Section 4301(d) and ERISA Section 502(e)(2), 29 U.S.C § 1132(e)(2), only Section
27 4301(d) is applicable. Section 4301(d) is the exclusive provision governing venue in
28 actions brought pursuant to Title IV of ERISA, including the Complaint. *See Flowers*
Indus., Inc. v. Bakery & Confectionary Union & Indus. Int’l Pension Fund, 565 F.
Supp. 286, 288 (N.D. Ga. 1983). ERISA Section 502(e)(2), on the other hand, is only
relevant to actions founded upon breaches of fiduciary duty under Title I of ERISA.

1 business” for purposes of Section 4301(d):

2 1) the character and nature of the business, 2) the continuity
3 of the business operations in the district (is it of a systematic
4 nature so as to constitute a pattern of business activity, or is
5 it merely composed of a single transaction or a single visit
6 with the state), 3) the number of contacts with the district
7 (*e.g.*, the court will examine such contacts as meetings,
8 telephone calls, mailings, solicitations, and negotiations ...),
9 4) the physical presence of the defendant in the forum (does
10 the defendant maintain an office or other facility in the
11 district, maintain a bank account, telephone listing, post
12 office box, or own any property or other assets in the
13 district), and 5) the method of doing business (is it by way
14 of direct representative, agent, subsidiary, franchise, or
15 other affiliate, or is the defendant a common carrier).

16 *Id.* (internal citation and quotation omitted).

17 With regard to the first factor (the nature of the business), the *Delta Air Lines*
18 court emphasized that a pension fund (like the NRF) is different than most
19 “businesses” in that “it is not set up as a profit-making endeavor per se, but rather to
20 protect workers and their respective employers by fostering the strength of the
21 pension plans and minimizing costs.” 722 F. Supp. at 729. Accordingly, Congress
22 intended the venue provisions of Section 4301 to be construed for the protection of
23 multiemployer pension plans in litigation with employers. *Id.* (citing the legislative
24 history of ERISA and the MPPAA). Thus, the first factor weighs in favor of the
25 NRF.

26 Likewise, the other factors weigh in the NRF’s favor. The NRF has no “brick
27 and mortar” presence in this district. It does not have an office, bank account, post
28 office box or telephone listing in the district. (Rust Decl. at ¶ 4.) It is administered in

1 New York and Rhode Island, and just one of its 48 trustees is based in this district.
2 (*Id.* at ¶ 6.) The NRF's activities in this district are limited to collecting pension
3 contributions from employers and paying benefits to participants who live in the
4 district. (*Id.* at ¶ 10.) The number of plan participants who reside in the district is *de*
5 *minimus*. Of over 435,000 participants in the NRF, fewer than five percent of the
6 NRF's participants are located in this district. (*Id.* at ¶¶ 8, 9.) More fundamentally,
7 the limited contacts the NRF has in this district have nothing to do with this case—
8 which arose from the withdrawal from the plan by RIH, the owner and operator of a
9 New Jersey hotel and casino, which employed plan participants in New Jersey and
10 made contributions to the NRF on the basis of the employees' work in New Jersey.

11 Section 4301(d) "was intended to make collection actions more efficient,
12 economical, and inexpensive for ERISA funds by permitting them to bring such
13 actions in their home districts." *Flynn*, 603 F. Supp. 2d at 50 (quotation marks an
14 citations omitted). By preemptively bringing this action in this district, the Colony
15 Parties seek not only to stop ERISA's statutorily mandated withdrawal liability
16 collection and dispute process, but also to burden the NRF with a litigation far from
17 its home district. A California litigation will undoubtedly be less efficient,
18 economical and far more expensive for the NRF than litigation in its home district in
19 New York. Based on the plain language of Section 4301(d) and Congressional intent,
20 venue is improper in the Central District of California, and this action should be
21 dismissed.⁹

22 **B. If Venue Is Proper In This District, The Case Should Be Transferred**
23 **To The Southern District Of New York.**

24 In the alternative, if venue is proper in this district, it is not the most
25

26 ⁹ In the alternative, if the Court believes that venue is improper in this district but that
27 it would serve the "interests of justice" to transfer this case rather than dismiss it
28 pursuant to 28 U.S.C. § 1406(a), the NRF respectfully submits that, for the reasons set
forth below, the Southern District of New York is the appropriate venue to which to
transfer it.

1 appropriate or convenient place for the action, and, therefore, the action should be
2 transferred to the Southern District of New York.¹⁰ Under 28 U.S.C. § 1404(a), “[f]or
3 the convenience of parties and witnesses, in the interest of justice, a district court may
4 transfer any civil action to any other district or division where it might have been
5 brought.” “To support a motion for transfer, the moving party must establish that (1)
6 venue is proper in the transferor district; (2) that the transferee district is one where
7 this action might have been brought; and (3) that the transfer will serve [the]
8 convenience of the parties and witnesses and will promote the interest of justice.”
9 *Vehimax Int’l v. Jui Li Enter. Co.*, CV 09-6437, 2010 U.S. Dist. LEXIS 42801, at *10
10 (C.D. Cal. Mar. 16, 2010).

11 **1. Venue Is Proper In The Southern District Of New York.**

12 Under Section 4301(d), “[a]n action under this section may be brought in the
13 district where the plan is administered or where a defendant resides or does business.”
14 Accordingly, venue is proper in the Southern District of New York because that is (1)
15 where the NRF is administered¹¹ and (2) where, as a result, it does substantial
16 business, including holding Trustees meetings. (Rust Decl. at ¶ 6.)

17 Some courts have interpreted the term “defendant” in Section 4301(d) to mean
18 “employer,” *Holland v. King Knob Coal Co., Inc.*, 87 F. Supp. 2d 433, 439 (W.D. Pa.
19 2000) (emphasis added) (“The statute provides a plan with a broad choice of venues .
20 . . . i.e., any district where *an employer* resides or does business or in the district where
21

22 ¹⁰ Venue would also be proper in the United States District Court for the District of
23 New Jersey because that is where Resorts is located, where the employees in respect
24 of whom withdrawal liability is owed worked and where relevant witnesses are
located. The NRF would not oppose transfer to that jurisdiction.

25 ¹¹ The NRF is administered in both New York and Rhode Island, making venue
26 proper in either location. *See United Food & Commercial Workers Intern. Union-
Indus. Pension Fund v. Spartan Stores, Inc.*, No. 92 C 3345, 1992 WL 309545, at *2
27 (N.D. Ill. Oct. 20, 1992) (“The unambiguous language of [Section 4301(d)] allows a
28 plan to proceed in the district where it currently is administered.”); *Lads Trucking Co.
v. Bd. of Trs. of W. Confer. of Teamsters Trust Fund*, 777 F.2d 1371, 1375 (9th Cir.
1985) (holding that when the plan is administered in more than one district, venue is
proper in any such district).

1 the plan is administered.”), which reflects the fact that lawsuits involving withdrawal
2 liability are generally brought by pension plans, not employers. Even under that
3 interpretation of the statute, venue is proper in the Southern District of New York,
4 because the Colony Parties reside and/or do business there. Colony Capital has one
5 of its offices in New York, and Colony Capital executives and personnel (including
6 the General Counsel) are based in that office. (*See* Cade Decl. at ¶¶ 2, 12, Ex. A.)
7 Upon information and belief, the Colony Parties’ managerial activities with respect to
8 Resorts and its affiliates took place in New York (from Colony Capital’s New York
9 office) and New Jersey (where Resorts is located). In addition, agreements with
10 respect to the 2009 Transaction were, on information and belief, negotiated by parties
11 located in New York. (Richman Decl. at ¶¶ 3, 4). Under those documents, the
12 Colony Parties submitted to the law of New York and the state and federal courts
13 therein. (Welch Decl. at Exs. 3, 5 & 7.) Based on these facts, venue is proper under
14 Section 4301(d) in the Southern District of New York.

15 **2. The Relevant Case-Specific Factors Weigh In Favor Of**
16 **Transferring The Action To The Southern District of New**
17 **York.**

18 Transferring the action to the Southern District of New York will serve the
19 convenience of the parties and witnesses and will promote the interest of justice.
20 Courts within this district weigh multiple factors in determining whether the moving
21 party has met its burden of proof, including:

22 (1) the location where the relevant agreements were
23 negotiated and executed, (2) the state that is most familiar
24 with the governing law, (3) the plaintiff’s choice of forum,
25 (4) the respective parties’ contacts with the forum, (5) the
26 contacts relating to the plaintiff’s cause of action in the
27 chosen forum, (6) the differences in the costs of litigation in
28 the two forums, (7) the availability of compulsory process to

1 compel attendance of unwilling non-party witnesses, and (8)
2 the ease of access to sources of proof.

3 *Alcatel Lucent United States, Inc. v. Dugdale Communs., Inc.*, CV 09-2140, 2010
4 U.S. Dist. LEXIS 22226, at *21-22 (C.D. Cal. Mar. 5, 2010) (quoting *Jones v. GNC*
5 *Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000)). These factors weigh in
6 favor of transferring this action to a more convenient venue in New York.

7 First, all of the parties to this dispute have substantial contacts in the Southern
8 District of New York. Both the NRF and Colony Capital have offices within the
9 Southern District of New York, and the Colony Parties conducted business relating to
10 RIH and Resorts out of those offices. Moreover, Colony Capital has availed itself of
11 the jurisdiction of the Southern District of New York by initiating a lawsuit in that
12 court. (Cade Decl. at ¶ 9, Ex. H.) Likewise, Colony Capital has availed itself of, and
13 submitted itself to, the jurisdiction of the New Jersey Gaming Authorities. (Welch
14 Decl. at ¶ 21.)

15 Second, relevant agreements were negotiated, executed and/or carried out in
16 New York and New Jersey and/or are governed by New York law, and many
17 potential witnesses are located in New York and New Jersey. While the issue of
18 whether the principal purpose of the 2009 Transaction was to evade or avoid
19 withdrawal liability is to be resolved in arbitration in New York, the issue of whether
20 the Colony Parties are employers under ERISA is a question to be determined by a
21 court. *Doherty*, 16 F.3d at 1390.¹² Testimony and documentary evidence in this case
22 will concern the determination of whether the Colony Parties are “trades or
23 businesses” that can be liable as “employers” within RIH’s controlled group for
24 RIH’s withdrawal liability to the NRF. Specifically, testimony and documentary
25 evidence will concern the Colony Parties’ level of influence and control over RIH and
26

27
28 ¹² Litigation and arbitration may proceed simultaneously. *Cent. States, Se. & Sw.*
Areas Pension Fund v. Slotky, 956 F.2d 1369, 1377 (7th Cir. 1992).

1 Resorts, including their involvement in the day-to-day operations of those entities,
2 including employment, operational and financial matters (such as the 2009
3 Transaction). *Cf. Palladium*, 722 F. Supp. 2d at 870.

4 Upon information and belief the Collective Bargaining Agreement pursuant to
5 which RIH was required to contribute to the NRF was negotiated in New Jersey.
6 (Rust Decl. at ¶ 14.) The Trust Agreement to which RIH (and the members of its
7 controlled group) are bound requires that all disputes thereunder be resolved in
8 arbitration in New York. (*Id.* at ¶ 17, Ex. 1.) Agreements with respect to the 2009
9 Transaction were, on information and belief, negotiated by parties located in New
10 York. (Richman Decl. at ¶¶ 3, 4). Moreover, the Colony Parties agreed that many of
11 those deal documents are governed by New York law and that they would submit to
12 the jurisdiction of state and federal courts in New York State for purposes of
13 resolving disputes thereunder. (Welch Decl. at Exs. 3, 5 & 7.)

14 Witnesses potentially include the NRF's plan administrator, employees of RIH
15 (who reside and work in New Jersey), Mr. Ribis (who worked as Resorts' CEO in
16 New Jersey), employees and executives of Colony Capital, including Mr. Barrack
17 (Colony Capital's Founder, Chairman, and CEO, who was an executive and director
18 of RIH in New Jersey), Mr. Sanders (Colony Capital's General Counsel, who works
19 in Colony Capital's New York office), and Column employees and others involved in
20 the 2009 Transaction who are based in New York. Some of the substantial number of
21 witnesses who live and work on the east coast are likely not subject to the subpoena
22 power of the Central District of California.

23 Transferring this action to New York will eliminate the need for most witnesses
24 to travel across the country for purposes of testifying, saving both time and money.
25 The NRF's counsel is based in New York as well. Transferring the action to the
26 Southern District of New York will save the NRF expenses. These cost savings are
27 particularly important in light of the NRF's precarious financial condition. Under the
28 Pension Protection Act, Pub. L. No. 109-280, § 202(b)(2) 120 Stat. 780 (2006) (the

1 “PPA”), a multiemployer plan is in “critical status” if its funded percentage is less
2 than 65 percent and certain other conditions are present, or if specified alternative
3 circumstances exist. On March 31, 2010 the NRF’s actuary certified that the NRF is
4 in critical status for purposes of the PPA. (Rust Decl. at ¶¶ 11-13.) By contrast,
5 transferring venue to the east coast will not result in substantial hardship to the
6 Colony Parties. Indeed, one of Colony Capital’s offices is in New York. Moreover,
7 although the Colony Parties’ lead counsel in this action is based in California, he
8 regularly provides legal services in New York (where his law firm has a large office).
9 (Richman Decl. at ¶ 2.)

10 Finally, deference to the Colony Parties’ choice of venue is not warranted.
11 “Deference to the plaintiff’s choice of venue is . . . diminished ‘if the moving party
12 establishes one or more of the following factors: (1) the operative facts have not
13 occurred within the forum; (2) the forum has no particular interest in the parties or
14 subject matter; (3) the forum is not the primary residence of either the plaintiff or
15 defendant; or (4) the subject matter of the litigation is not substantially connected to
16 the forum.’” *Metz v. U.S. Life Ins. Co. in City of New York*, 674 F. Supp. 2d 1141,
17 1146 (C.D. Cal. 2009) (citations omitted); *see also Alcatel*, 2010 U.S. Dist. LEXIS
18 22226, at *30 (“[I]n determining the amount of deference to be given to the plaintiff’s
19 choice of forum, a court must consider the extent of both the plaintiff’s and the
20 defendant’s contacts with the forum, including those relating to the plaintiff’s cause
21 of action.”); *Broadcast Data Retrieval Corp. v. Sirius Satellite Radio, Inc.*, CV 06-
22 1190, 2006 U.S. Dist. LEXIS 37641, at *8-9 (C.D. Cal. June 6, 2006) (granting
23 transfer to the Southern District of New York, noting that “‘where the forum lacks a
24 significant connection to the activities alleged in the complaint,’ the degree to which
25 courts defer to the plaintiffs chosen venue is ‘substantially reduced.’” (citations
26 omitted)). The only connection between this district and this action is that the Colony
27 Parties have an office in the district. Deference to the Colony Parties’ choice of
28 forum is, therefore, unwarranted.

1 **C. The Judges In The Southern District Of New York Have Fewer**
2 **Filings Than The Judges In This District.**

3 “Some courts also consider the relative congestion of the transferor court’s
4 docket to that of the transferee court.” *Fontaine v. Washington Mutual Bank, Inc.*,
5 CV 08-5659, 2009 U.S. Dist. LEXIS 41168, at *16-17 (C.D. Cal. Apr. 30, 2009).
6 According to the 2010 U.S. District Court Judicial Caseload Profile, the Southern
7 District of New York has approximately 20 percent fewer total filings per judge than
8 this Court. This difference weighs in favor of transfer to the Southern District of New
9 York.

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Complaint should be dismissed, or, in the
12 alternative, transferred to the Southern District of New York.

13
14 DATED: September 19, 2011

Respectfully submitted,

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